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January 4, 2002

Mary L. Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station, 2<sup>nd</sup> Floor  
Boston, Massachusetts 02110

RE: Initial Comments, Competitive Market Initiatives, Phase II, D.T.E. 01-54

Dear Secretary Cottrell:

On November 14, 2001, the Department of Telecommunications and Energy ("Department") held a technical conference in Competitive Market Initiatives, Phase II, D.T.E. 01-54. At the technical conference the Department requested comments on several issues. On December 11, 2001, the Hearing Officer issued a Memorandum requesting comments on specific issues relative to Phase II. The Attorney General submits this letter as his Comments.

### **Introduction**

On June 29, 2001, the Department issued an Order opening a formal investigation into competitive market initiatives with the intent to minimize or eliminate any barriers to competitive choice. *Investigation by the Department of Telecommunications and Energy on its own Motion into Competitive Market Initiatives*, D.T.E. 01-54. In that Order, the Department stated that it would phase its investigation and identified the areas that would be investigated separately. D.T.E. 01-54, at 8-11 (2001).

On October 15, 2001, the Department issued an Interlocutory Order in D.T.E. 01-54, outlining the issues to investigate in Phase II. D.T.E. 01-54A, at 37 (2001). The Department stated that it would investigate the appropriate role of a distribution company as an electricity broker, the specific applications of electronic signatures and the technology required for implementation, and customer information required for suppliers to enroll customers. Id at 38.

The December 11<sup>th</sup> Hearing Officer Memorandum issued in Phase II requested comments on specific questions. Although the Department stated that the goal of its inquiry in Phase II is to minimize or eliminate barriers to competitive choice, and to identify and implement initiatives that would expand the range of options available to consumers, the Department's ability to impose regulatory solutions is limited by the grant of legislative authority in the Electric Restructuring Act of 1997 (Act). St. 1997, c.164. The Act establishes a functional separation between distribution companies and competitive suppliers in the changed regulatory environment and the role of each company is limited to the authority granted by the Act. Where the plain language of the Restructuring Act is unambiguous relative to the questions posited in the Hearing Officer Memorandum, the statute will guide the regulatory options available to the Department. If, subsequent to an evidentiary investigation, the Department identifies these statutory limitations as a barrier to competitive choice, the remedy is to seek legislative redress. Absent further legislative authority, the Department must give full force and effect to the plain language of the statute as it conducts its inquiry.<sup>1</sup>

### Questions and Responses

1. Should electric distribution companies perform the role of electricity brokers for their default service customers?

Electric distribution companies should not perform the role of electricity broker for their default service or standard offer service customers. The Electric Restructuring Act established the framework to restructure the regulatory system that governs the purchase and provision of electricity to ratepayers in the Commonwealth. The Act changed the electric regulatory system from a monopoly structure to a competitive market structure.<sup>2</sup>

The unbundling of distribution service from generation service, and the separation of the roles played by each service provider, is a central underpinning of electric restructuring, and a key component of the restructured regulatory system established by the Act. The Legislature stated clearly that "the interests of consumers can best be served by an expedient and orderly transition from regulation to competition in the generation sector consisting of the unbundling of prices and services and the functional separation of generation services from transmission and distribution services." St. 1997, 164, 1(l).

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<sup>1</sup> When the language of a statute is plain and unambiguous, it must be given its ordinary meaning. See *Victor V. v. Commonwealth*, 423 Mass. 793, 794, 672 N.E. 2d 529 (1996), and cases cited.

<sup>2</sup> The enabling language states that "ratepayers and the commonwealth will be best served by moving ... to (ii) a framework under which competitive producers will supply electric power and customers will gain the right to choose their electric power supplier." St. 1997, 164 (1)(c).

The Act establishes different roles for distribution companies and suppliers in the restructured electricity market relative to the products and services each offers to customers.<sup>3</sup> The Act does not authorize a distribution company to become a competitive supplier, nor does it authorize a distribution company to perform the functions of a competitive supplier. In its Orders in D.T.E. 01-54 and D.T.E. 01-54A, the Department recognized that an electricity broker is encompassed by the term competitive supplier.<sup>4</sup>

The Act contains an explicit prohibition against an electricity company being considered a supplier. While an electric company is required to accommodate retail access to generation services and choice of suppliers, it is not authorized or mandated to perform the functions of a competitive supplier. G.L. c. 164, § 1F. Those functions are attributed solely to generation companies, aggregators, suppliers, energy markets and energy brokers licensed by the Department. G.L. c. 164, § 1F(1)(ii). The role of an electricity broker is a role specifically assigned to a separately licensed competitive market participant, not to a distribution company.

The functional separation between distribution companies and competitive suppliers is also evident in the type of service each is allowed to provide. For example, while distribution companies are authorized to provide standard offer or default service, they are prohibited from selling electricity at retail, except as provided in the Act. The Act specifically delineates the relationship of a distribution company to a competitive supplier, and does not establish an additional role for distribution companies in the competitive market.

Although the Department seeks to investigate ways to minimize or eliminate barriers to competitive choice, and to identify and implement initiatives that would expand the range of options available to consumers, the Department's ability to impose regulatory solutions is limited by the grant of legislative authority in the Act. Since the Act does not authorize a distribution company to perform the role of electricity broker for either default or standard offer customers, the actions of the Department must be guided by the plain language of the Act. An interpretation other than one which recognizes the functional separation of distribution companies and competitive suppliers would contravene the Act.

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<sup>3</sup> "Distribution company" is "a company engaging in the distribution of electricity or owning, operating, or controlling distribution facilities." G.L. c. 164, §§ 164 (1). The term "supplier" is defined as "any supplier of generation service to retail customers, including power marketers, brokers, and marketing affiliates of distribution companies, except that no electric company shall be considered a supplier." G.L. c 164, §§ 164 (1). An "electric company" is defined as "a corporation organized under the laws of the commonwealth for the purpose of making by means of water power, steam power or otherwise and selling, or distributing and selling, or only distributing, electricity within the commonwealth, or authorized by special act so to do, even though subsequently authorized to make or sell gas."

<sup>4</sup> D.T.E. 01-54A (2001), p.1., fn. 1.

- A. Should electric distribution companies participate in Internet-based auction processes to assist the movement of their default service customers to competitive suppliers?

A distribution company could participate in internet-based auction processes as a passive participant by providing access to an internet-based auction on its web site in compliance with the affiliate provisions established in the Act, and the Department's Order conditioning affiliate transactions in *Petition of Fitchburg Gas and Electric Light Company, pursuant to General Laws, Chapter 164, §§§§ 1, 76 and 94, and 220 C.M.R. §§§§ 1.00 et seq., for review of its electric industry restructuring proposal*, D.T.E. 97-115/98-120 (1999), p. 9. Otherwise, an electric distribution company should not participate in Internet-based auction processes to assist the movement of their default service customers to competitive suppliers. While a distribution company is authorized to provide default service to customers who require or select that service, a distribution company is not authorized to move customers to a competitive supplier without the express authorization of the customer, as provided in the Act, and in accordance with consumer protection regulations.<sup>5</sup>

- B. Should electric distribution companies obtain direct authorizations (e.g., via telephone or return post card) to switch default service customers to competitive suppliers?

In order for a distribution company to switch a default service customer to a competitive supplier, the company must receive customer authorization that complies with the customer authorization and third-party verification requirements of G.L. c. 164, § 1(F)(8)(a), 220 C.M.R. § 11.05(4) and 940 C.M.R. § 19.05. A distribution company that obtains a direct authorization from a default service customer to switch to a competitive supplier should be permitted to switch the customer provided that the authorization complies with the third-party verification requirements.

- C. Should distribution companies assign default service customers to competitive suppliers?

No, a distribution company should not assign default service customers to competitive suppliers. A distribution company that assigns a default service customer to a competitive supplier without the customer authorization required in G.L. c. 164, § 1(F)(8)(a), 220 C.M.R. § 11.05(4) and 940, C.M.R. § 19.05, would subject the company to fines and penalties. Further, as stated in the Attorney General's comments filed in Phase I of this proceeding, the Attorney General considers the unauthorized switching of a customer to a competitive supplier as an unfair and deceptive trade practice or act, actionable under the provisions of G.L. c. 93A.

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<sup>5</sup> See G.L. c. 164, § 1(F)(8)(a), 220 C.M.R. § 11.05(4) and 940 C.M.R. § 19.05.

2. Customer Enrollment:

- A. Should customer account numbers be included on the Customer Information Lists? If so, please address how consumer protections against unauthorized enrollments can be maintained if account numbers are included on the Customer Information Lists.

Customer account numbers should not be included on the Customer Information Lists. The inclusion of such information is not necessary for the purposes identified by the Department as the justification for its order in D.T.E. 01-54A. The Attorney General renews his objections to the release of customer information on Customer Information Lists without prior customer consent. In D.T.E. 01-54A, the Department stated that the release of such information was necessary to account for the practicalities of mass-marketing.<sup>6</sup> The inclusion of additional information, such as an account number or any other type of information, is unnecessary to perform a marketing function, would further erode customer privacy protections and would likely facilitate the unauthorized switching of customers.

- B. Should the first four characters of a customer's account name continue to be required for a successful enrollment of the customer? If so, please address how consumer protections against unauthorized enrollments can be maintained. Should this requirement differ among customer classes?

Yes, requiring the first four characters of a customer's account name or another equally protective validation system should be required in order to enroll a customer. Other businesses employ validation systems as a standard business practice and this type of safeguard will serve as an additional consumer protection measure to prevent the unauthorized switching of a customer.

3. Customer Information List issues:

- A. Should the Customer Information Lists be expanded to include information about customer service delivery points?

No, information about customer delivery service points should not be included in the Customer Information List. Information about customer service delivery points is private, and should be provided only at the discretion of a customer upon an authorized switch to a competitive supplier.

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<sup>6</sup> D.T.E. 01-54A, p. 11, "Failure to account for the practicalities of mass-marketing, while at the same time ensuring consumer safeguards are in place would have the ultimate effect of subverting the central purpose of the Restructuring Act: namely, to extend the efficiencies and probably cost-saving benefits of competition to consumers."

- B. Should the Customer Information Lists be expanded to include information about customers who receive generation service from competitive suppliers?

No, in the Order opening this investigation, the Department stated that the purpose of the inquiry is to eliminate barriers to competition. D.T.E. 01-54, p.2 (2001). The situation in which a customer has chosen a competitive supplier and is receiving service from that supplier would fulfill the central objective of the Department's Order, and the requiring the further release of information would be outside the scope of the Department's inquiry. In addition, if a distribution company releases inaccurate information about a customer's service status, the company would assume the risk associated with the misuse of that information.

4. Other Issues

- A. Should distribution companies use the Internet for the transmission of customer data between the companies and competitive suppliers? Please discuss any benefits and costs of Internet use.

While the Attorney General does not object to a distribution company using the Internet for the transmission of customer data between the company and competitive suppliers, the Attorney General cautions that companies are responsible for ensuring the transmission security of the data and may be liable for any unauthorized release of information.

Thank you for the opportunity to submit these comments.

Sincerely,

Judith Laster  
Assistant Attorney General

cc: Jeanne Voveris, Hearing Officer,  
8 copies  
Electronic Service List

